STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS RIOS CLASSIFIED EMPLOYEES ASSOCIATION. AFSCME LOCAL 3149. Charging Party.	)	Case No. S-CE-695
v. LOS RIOS COMMUNITY COLLEGE DISTRICT. Respondent.	)	PERB Decision No. 499 March 21, 1985

Appearances; Kathy Felch. Attorney for the Los Rios Classified Employees Association. AFSCME Local 3149; John L. Bukey, General Counsel for the Los Rios Community College District.

Before Hesse, Chairperson; Jaeger and Burt, Members.

DECISION

BURT. Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Rios Classified Employees Association, AFSCME Local 3149 (Association or Charging Party) to the attached proposed decision of an administrative law judge (ALJ), dismissing charges that the Los Rios Community College District (District) violated section 3543.5(c) of the Educational Employment Relations Act (EERA)[1]

[1]The EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise indicated.

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:

by unilaterally altering the operating procedures of an advisory board to review job classifications.

The Board has carefully reviewed the entire record in this case, and we affirm the ALJ's finding that there was no violation for the reasons set forth below.

DISCUSSION

We find that the ALJ's findings of fact are free from prejudicial error and we adopt them as the findings of the Board itself.

The Association excepts, claiming that the conclusions reached by the ALJ are not supported by the evidence and his credibility resolutions are not adequately justified. It excepts particularly to the ALJ's crediting the testimony of John Bukey and Jimmy Mraule over that of Ann Lynch and Warren Nelson regarding what was said at the March 18 meeting.

In Santa Clara Unified School District (9/26/79) PERB Decision No. 104, the Board considered the standard of review applied to credibility determinations of its ALJs. It rejected the suggestion that determinations rendered by the agency's ALJs based on the observation of witnesses would be upheld and affirmed unless such findings were "clearly erroneous." It decided instead that.

. . . . . .

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

> . . . while the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inference from the evidence presented.

See also Anaheim City School District (5/14/84) PERB Decision No. 364a.

Here the ALJ considered testimony of all four witnesses who were participants to the March 18 meeting, and concluded that Bukey had indeed remarked that voting might be necessary to resolve conflicts in the decision making of the review board. In so concluding, the ALJ considered the conflicting testimony in light of the history of negotiations between the parties. While he found that Bukey initially mentioned decision making by consensus, he found as well that the negotiations had progressed considerably by the time of the March 18 meeting when agreement was reached. The ALJ relied on Bukey's direct testimony about what was said and on the notes taken by Mraule. While Mraule testified that she did not know exactly who typed the notes or exactly when, she testified that they were a typed version of her own notes, typed within a day of the meeting, with minor corrections by her to make sure they were accurate. She also testified that when the issue was raised at the first review board meeting, she indicated that she did not interpret the negotiations to require consensus.

We find the ALJ's findings of fact here, based on his credibility resolutions and the record as a whole, are entitled to the deference contemplated by Santa Clara, supra, and we reject the Association's argument that the ALJ's conclusions are illogical in light of the record. There is ample evidence in the record to conclude that, while the Association may have wished to obtain agreement to a consensus voting procedure, no such agreement was reached. In the absence of a change in an established policy embodied in the contract or evident by past practice, an unlawful unilateral change will not be found. Grant Joint Union High School District (2/26/82) PERB Decision No. 196.

The Charging Party further excepts to the ALJ's decision, claiming that the ALJ erred in finding that the Association waived its right to negotiate, arguing that there is no duty to request negotiations after an unlawful unilateral change. As noted above, however, we find that no unilateral change occurred. Further, the Association mischaracterizes the finding of the ALJ. He did not find that the Association waived its right to negotiate, but rather that there was no refusal on the District's part.

ORDER

The unfair practice charges in Case No. S-CE-695 are DISMISSED.

Chairperson Hesse and Member Jaeger joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS RIOS CLASSIFIED EMPLOYEES ASSOCIATION, AFSCME, LOCAL 3149, Charging Party, v. LOS RIOS COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. S-CE-695 PROPOSED DECISION (6/5/84)

Appearances: Kathy Felch, Attorney, for the Los Rios Classified Employees Association, AFSCME, Local 3149; John Bukey, General Counsel, for the Los Rios Community College District.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

During a 1983 negotiations reopener, a union consented to the creation of an advisory board to review job reclassifications. The union contends that it consented to the plan only because decisions of the review board were to be made by consensus. When the review board subsequently adopted a procedure to decide issues by majority vote, the union alleged that the employer had made a unilateral change and filed this charge.

The employer does not deny that the word, "consensus," was used in a negotiator's description of how the board would reach decisions. However, the employer responds, the possibility of voting was held out at the time of agreement. In any event,

the employer continues, the parties agreed that the policies and procedures of the board would be subject to further discussion. The employer argues that by scheduling and then cancelling a meeting to discuss policies and procedures, the union waived any complaint it might have.

The alleged understanding that the reclassification review board would act by consensus was not placed in writing.

This charge was filed on October 27, 1983, by the Los Rios Classified Employees Association/American Federation of State, County and Municipal Employees Local 3149 (hereafter AFSCME or Union). The charge alleged that the Los Rios Community College District (hereafter District) had failed to meet and negotiate in good faith, a violation of Educational Employment Relations Act subsection 3543.5(0).[1] On November 29, 1983, the Sacramento regional attorney of the Public Employment Relations Board (hereafter PERB) issued a complaint against the District for the conduct described in the Union's charge. The District

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[1]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to:
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> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
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> . . . . . .

answered the charge on December 19, 1983, denying that it had made a unilateral change and asserting affirmatively that the Union had waived its right to bargain through inaction.

A hearing was conducted on February 21, 1984. The final brief in the case was filed on April 26, 1984, on which day the case was submitted for decision.

FINDINGS OF FACT

The Los Rios Community College District, a public school employer under the EERA, operates three community colleges in Sacramento. At all times relevant, AFSCME has been the exclusive representative of a unit comprised of the District's approximately 645 office, technical and food service employees.[2] Also at all times relevant, Local 22 of the Service Employees International Union has been exclusive representative of the District's 297-member operations support services unit and the Los Rios Supervisors Association has been exclusive representative of a 31-member classified supervisors unit.

For some time prior to the dispute at issue, the parties had been troubled by the lack of an efficient method for resolving disputes about job classifications. AFSCME business agent Warren Nelson testified that the Union was dissatisfied with the absence of a procedure for an employee to secure a job

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[2]The unit descriptions and number of members are drawn from PERB representation records on units in place.

reclassification or have an audit of job duties. District negotiator John Bukey testified that the District also wanted a procedure, at least in part to curtail "creeping reclassification." He described "creeping reclassification" as employee assumption of unassigned duties followed by a claim that the employee had performed out-of-class work.

Coincidental with the increasing awareness of the reclassification problem, the District commissioned an outside consultant to study certain clerical positions. The consultant recommended massive classification changes which the District was not prepared to implement. However, the report provided the District with an incentive to establish a system to resolve reclassification disputes.

In January of 1983, the parties commenced a mid-term reopener in their three-year contract. By mutual agreement, the issue of reclassification was brought to the table. The District made the first proposal on the subject at a March 3, 1983, negotiation session. The essence of the District's proposal was for the creation of a reclassification review board composed of five representatives of the District and one representative each from AFSCME and the other two exclusive representatives, Local 22 of the Service Employees International Union and the Los Rios Supervisors Association. Under the District proposal, the reclassification review board would be an advisory body to the individual campus presidents

and the District executive vice chancellor. Recommendations approved by the reclassification board would be forwarded to the cabinet of the District chancellor for review prior to presentation to the chancellor and ultimately, the board of trustees.

Notes taken at the March 3 negotiating session by Union team member Jean Kovak describe most of the discussion about the proposal. According to her notes, District negotiator Bukey stated that, "agreement by [the] board must be [by] consensus." He also stated that, "grievance procedure and legal rights will be [an employee's] recourse if this is not workable." Ms. Kovak credibly testified that the notes accurately reflect the statements made at the meeting. No commitment was made by the Union at the March 3 meeting.

At the next negotiating session, held on March 10, the Union proposed that the reclassification review board be supplemented by a panel which would meet once a year to review appeals from board actions. Under the Union's proposal, the three-member panel would be composed of a representative from the District, a representative from the Union and a neutral third party to break a tie. Decisions of the appeals panel would be binding.

On March 18, 1983, the parties met again and it was at the March 18 session that an agreement was reached on the reclassification board. The District rejected the AFSCME

proposal to create a binding appeals panel to review decisions of the reclassification board. However, the District did make some modifications of its proposal in an effort to win union acceptance. Mr. Bukey testified that Union representatives asked him a series of questions about the operation of the proposed reclassification board. In answer to a question about how the board would reach decisions, Mr. Bukey testified that he told the Union he "saw the board as a consensus group, but that should an issue come down to the wire, it may require a vote." He also testified that the parties agreed that the reclassification review board "would make up its own operating rules."

AFSCME negotiator Nelson testified that he complained that composition of the board was "stacked" in favor of management and that on any issue the Union representative would be out voted. Mr. Nelson testified that in response to his complaint Mr. Bukey replied that decisions of the review board would be by consensus. Mr. Nelson said he understood consensus to mean by mutual agreement. If there were one board member opposed to a proposal, Mr. Nelson said, he believed there would be no consensus. In the absence of unanimity on the review board, under Mr. Nelson's understanding of the agreement, an employee's only recourse would be through the grievance process. Mr. Nelson said it was Mr. Bukey's statement that decisions would be made by consensus that "allowed us to reach

a conclusion and a settlement on the issue of a reclassification board."

Ann Lynch, AFSCME chapter president and a participant at the March 18 negotiating session, also testified about Mr. Bukey's statement on that day. She recalled Mr. Bukey saying, "that decisions would be reached by a consensus and that there would not be voting." She said that the Union agreed to the composition of the board despite its management majority because it knew decisions would be reached by consensus. She said that as she understood the agreement, an employee seeking reclassification would have to win 100 percent concurrence of reclassification board members. It was her understanding that one dissenting opinion would kill a reclassification.

The fourth witness to the March 18 negotiating session to testify at the PERB hearing was Jimmy Mraule, the District's classified personnel manager. Ms. Mraule took notes at the negotiating session which within a day or so after the meeting she transcribed into typewritten notes. Her transcribed notes, which were received into evidence, contain the following description of Mr. Bukey's remarks about the reclassification review board:

> It was agreed that the Reclassified Review Board would make up its own operating rules. John Bukey indicated he saw this Board as a consensus group but that should an issue come down to the wire, it may require a vote. At the request of the Board an employee whose position is up for

> reclassification may be called to testify in his/her behalf. Union representation would be allowed to present a case for members of their union with concurrence by members of Board.

Despite the varying versions of Mr. Bukey's remarks on March 18, it is agreed that on that date the parties reached an understanding that a classification review board would be created. The board would be established through District regulations, the exact text of which the parties agreed upon at the March 18 meeting. The District further agreed that reference to the board would be included in the contract but the wording of that reference was left to subsequent discussion. The purported agreement that the review board would not engage in voting was not placed in writing.

At the Union's insistence, the parties on April 7 entered a written "understanding concerning Union participation in the District classification review board."3 AFSCME negotiator

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3The text of the April 7, 1983, understanding reads as follows:

> In the March 18, 1983, negotiations session held between the District and AFSCME/LRCEA Local 3149, an understanding was reached by the parties on the issue of union participation in the proceedings of District Reclassification Review Board. While not specifically enumerated in Section 3.4 of the Permanent Reclassification Procedure, the above parties agree that the Union appointed board member, who shall be a District employee and member of the bargaining unit, may have a Union staff person accompany him/her to the Board

Nelson testified that the Union believed the separate agreement was necessary "(b)ecause the parties had not worked out a number of the mechanics of mechanical workings of the board itself." The April 7 agreement specifies that the Union-appointed member of the board would be entitled to have the assistance of a Union staff person during board meetings. The agreement further specifies that employees may appear with witnesses at board meetings where their reclassification requests will be considered. Finally, the agreement provides that,

> . . . the policies and procedures pertaining to functioning of the reclassification board will be subject to further discussions between the District and the Union.

> meetings when classifications pertaining to that bargaining unit are to be heard. That staff person may fully participate in the deliberations of the Board. Additionally, those classified employees whose reclassification requests are slated for Board review may appear in accordance with procedures established by the Board, along with employees who might give testimony on their behalf, before the Reclassification Board.
>
> It is also understood by both parties that the policies and procedures pertaining to functioning of the Reclassifiction Board will be subject to further discussions between the District and the Union.
>
> It is with these understandings that AFSCME/LRCEA Local 3149 agrees to accept, without revision, the draft or the Permanent Reclassification Procedure dated March 21, 1983, submitted by the District.

Mr. Nelson testified that when he entered the April 7 understanding he believed that the provision for further discussions pertained to "the mechanics of, and the scheduling of meetings, things like that, how many witnesses could come . . . would they get release time from their work . . . the mechanics of presenting a case." He said he did not think of voting because he did not believe there was to be any voting.

On September 16, 1983, Union President Lynch wrote a memo to District negotiator Bukey requesting that the District "negotiate the policies and procedures for the functioning of the reclassification review board." Mr. Bukey testified that he made no response to the letter, although he had some doubts about a demand to negotiate over what he saw as a "consensual matter." He said the parties earlier had scheduled a meeting for September 19 to discuss a factfinding matter and he decided to raise the demand at that meeting.

Mr. Bukey testified that at the September 19 meeting the parties briefly discussed the demand to negotiate. By that date, the reclassification review board had not yet held its first meeting. Mr. Bukey suggested to the Union representatives that the parties should wait to see what procedures the board adopted before conducting discussions about them.

The first meeting of the reclassification board was held on September 29, 1983. The meeting commenced with the nomination

and election of a chairperson. The board then voted on a series of internal procedures without any significant disagreement. Among the procedures to which the board members agreed were for the creation of a consent agenda for approval of reclassifications about which there was no opposition. The board members also agreed that an employee requesting reclassification would have 10 minutes to make a presentation either personally or by a representative. A procedure for scheduling presentations was approved as was the method of recording minutes.

Following the series of votes, AFSCME President Lynch objected to the process of voting. Ms. Lynch told board members that during negotiations AFSCME had been "told and promised [that] it would not be a voting process, that decisions reached by this board would be by consensus and it was not a voting type body." She said she had understood that the reclassification review board "would be an advisory body and . . . all decisions would be made a consensus." Classified Personnel manager Mraule challenged the contention that it had been agreed in negotiations that there would be no voting. The matter was resolved by a vote with the majority voting to resolve non-consent items by vote.

Following the reclassification review board meeting, AFSCME business agent Kathy Felch, the successor to Mr. Nelson, and Ms. Lynch encountered District representative Bukey in the

hallway. Mr. Bukey was not a member of the classification review board and had not attended the meeting. Ms. Felch testified that she said to Mr. Bukey, "We have a problem with what happened in there today." She quoted his response as, "I don't want to hear about it." In his testimony, Mr. Bukey recalled the hallway encounter and remembered only telling the AFSCME representatives that the appropriate way to discuss the issue was to set up a meeting.

Subsequently, at the request of Ms. Felch a meeting was scheduled for October 13, 1983, to discuss the operation of the reclassification review board. However, the meeting was cancelled at the request of Ms. Felch and had not been rescheduled as of the date of the hearing. Ms. Felch testified that she cancelled the meeting because the scheduled date was in conflict with other obligations of Mr. Nelson, the former business agent. Ms. Felch did not attempt to reschedule that meeting because,

> . . . in further consultation with other members of the Union it was felt that the meeting would not resolve the only issue outstanding with regard to the reclassification review board and that was the voting procedure . . . .

LEGAL ISSUE

Did the District violate section 3543.5(c) by making a unilateral change in the decision-making process of the reclassification review board?

CONCLUSIONS OF LAW

The Union argues that the District made an unlawful unilateral change by instituting a process of decision-making by voting within the reclassification review board. The Union contends that the institution of voting was contrary to an explicit commitment made by the District during negotiations and that the change was accomplished over Union objection. The Union argues that the procedure for decision by the classification review board is a matter within the scope of representation and that the change could not be made unilaterally. Citing both PERB and federal precedent, the Union argues that the District's action was per se a failure to negotiate in good faith.

The District asserts first that the subject is not ripe for adjudication because there is no showing of harm by the Union. The District contends that the Union has made no showing that decisions of the board were not by consensus. In addition, the District continues, there was no unilateral change. The District argues that at the March 18 meeting, where agreement was reached, the District negotiator made it clear that the board would use a voting procedure as the ultimate determinant. Alternatively, the District concludes, the Union waived any right it may have had to negotiate about the issue of voting when it cancelled a meeting scheduled to discuss the question.

It is well established that an employer that makes a pre-impasse unilateral change about a matter within the scope of representation violates its duty to meet and negotiate in good faith. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. See generally, Davis Unified School District (2/22/80) PERB Decision No. 116, San Francisco Community College District (10/12/79) PERB Decision No. 105 and San Mateo Community College District (6/8/79) PERB Decision No. 94.

At issue here is the procedure by which the District will review the classification of employee jobs. Inherent in the classification process is the potential for the transfer of work among positions, the establishment of new classes, the reclassification of existing jobs and the designation of job titles. These are subjects within the scope of representation under Alum Rock Elementary School District (6/27/83) PERB Decision No. 322. It follows that if the work of the reclassification review board is within the scope of representation then the manner of the review board's operation is itself within scope.

The key question, of course, is whether or not the decision of the reclassification review board to vote on contested issues amounted to a unilateral change. The parties have highly conflicting versions of the March 18, 1983, negotiating

session at which the alleged agreement to act by consensus purportedly was reached. All witnesses agree that Mr. Bukey stated that the reclassification review board would make decisions by "consensus." However, Mr. Bukey and Ms. Mraule testified that the statement was accompanied by the caveat that "should an issue come down to the wire, it may require a vote." In his testimony, Mr. Nelson made no mention of such a caveat. Ms. Lynch testified that Mr. Bukey specifically said, "there would not be voting."

The Union's version of the agreement is undercut by its improbability. According to the Union, it was only because of the District's commitment that decisions would be made by consensus that the Union agreed to the creation of the reclassification review board. Yet the Union's own witnesses testified that Mr. Bukey first suggested that decisions would be made by consensus on March 3 when he initially raised the idea of a reclassification review board. If decision by consensus was the key factor in the Union's decision to accept the proposal the Union could have accepted it on March 3 rather than at the negotiating session two weeks later. The Union rejected that initial District proposal.

It also is difficult to understand how the Union failed to secure in writing the supposed commitment that there would be no voting. If, as Mr. Nelson testified, the promise that there would be no voting was the crucial factor in reaching agreement

one would expect the Union to have demanded it in writing. Other elements of the agreement which the Union considered essential were secured in writing.[4] Failure of the Union to secure in writing the supposed commitment that there would be no voting erodes the persuasive character of testimony that the March 18 agreement was premised on the absence of voting.

While it is clear that the District's March 3 offer contained an unqualified promise that the board would act by consensus, the Union rejected that offer when it made its March 10 counteroffer. The District, in turn, rejected the Union's counteroffer and on March 18 reinstituted its original offer, with one significant variation. That variation, Mr. Bukey and Ms. Mraule credibly testified, was the addition of the caveat that decisions would be by consensus except that "should an issue come down to the wire, it may require a vote."

At this point, Union negotiators apparently realized that the District would not agree to creation of any type of review panel over which the District could not retain control. The option presented to the Union on March 18 was the District

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4The April 7 sideletter, footnote no. 3, supra, specifically provides, for example, that the Union representative to the reclassification review board would be entitled to have a "Union staff person accompany him/her to the (b)oard meeting." The sideletter also provides that the staff person "may fully participate in the deliberations of the (b)oard" even though he/she will not be able to vote. The Union considered this element to be essential and secured it in writing.

proposal or no review panel at all and a continuation the process of review of reclassification requests by grievance only. Apparently believing that something was better than nothing, the Union accepted the District proposal. By accepting the District proposal, the Union implicitly accepted the District's ultimate retention of control.

At its first meeting, the reclassification review board proceeded exactly as outlined by Mr. Bukey at the March 18 negotiating session. The panel established a process for approval of certain classification changes by unanimous consent, i.e., "consensus." As to reclassifications over which a member or members had doubts, full presentations were scheduled for later consideration presumably including, if necessary, a vote.

To a substantial degree, the dispute over voting vs. consensus is an argument over a gossamer. Evidence introduced at the hearing established that the essential purpose of the reclassification review board would be to review employee requests for reclassifications. Under the Union's version of the agreement, no employee could obtain a reclassification unless there were a consensus among the members of the board. The Union witnesses interpreted consensus to be "unanimous agreement." Thus, if one District-appointed member of the review board opposed a proposed reclassification it would be defeated. Under a voting procedure, at least four negative

votes would be required to defeat a reclassification request. Either way, the District holds the power to decide whether a proposed reclassification has merit. In addition, under either consensus or voting, the decision of the review panel is not final. It is merely a recommendation to the District administration and ultimately, to the board of trustees. Thus, even under the Union's reading of the agreement, the District maintains ultimate control over all reclassifications.

It is concluded that the District made no unilateral change by instituting a process of voting over disputed matters before the reclassification review board. The practice adopted by the board was precisely that outlined by the District negotiator during the March 18 negotiating session where agreement was reached. It likewise is concluded that the District has not failed to negotiate with the Union about the voting procedure. At the Union's request, a meeting to negotiate about the voting procedure was scheduled for October 13, 1983. Again, at the Union's request, the meeting was subsequently cancelled. There is no basis for the Union's argument that it would have been futile for the Union to go forward with the negotiations session.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, unfair practice charge S-CE-695; filed by the Los Rios Classified Employees

Association, AFSCME Local 3149, against the Los Rios Community College District and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 25, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on June 25, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305 as amended.

Dated: June 5, 1984

Ronald E. Blubaugh
Hearing Officer